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No. 00-1293

In the Supreme Court of the United States

JOHN ASHCROFT, ATTORNEY GENERAL OF THE UNITED STATES, PETITIONER

v.

AMERICAN CIVIL LIBERTIES UNION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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The court of appeals held, sua sponte, that the Child Online Protection Act's (COPA) reliance on community standards "must lead inexorably to a holding of a likelihood of unconstitutionality of the entire COPA statute." Pet. App. 21a. As we explain in our petition, that constitutional ruling not only renders the entire COPA statute unenforceable; it also threatens to cripple Congress's ability to regulate material that is harmful to minors on the World Wide Web. The court's holding also conflicts with decisions of this Court. Review by this Court is therefore clearly warranted.

1. Respondents do not dispute that the court of appeals' ruling renders the entire COPA statute unenforceable. Nor do respondents argue that further proceedings in the district court are needed to render the court of appeals' ruling ripe for review by this

Court. Respondents nonetheless oppose certiorari, arguing that COPA violates the First Amendment.

That argument provides no basis for failing to grant review in this case. When a court of appeals invalidates an Act of Congress and prevents any enforcement of that Act, review by this Court is warranted on that basis alone. See *United States* v. *Gainey*, 380 U.S. 63, 65 (1965) (certiorari granted "to review the exercise of the grave power of annulling an Act of Congress"). This Court, and not a court of appeals, should finally resolve the question whether an Act of Congress satisfies constitutional standards. This Court has repeatedly granted government petitions to review appellate court decisions that concern the constitutionality of an Act of Congress and that prevent its enforcement. The Court should grant review in this case for the same reason.

2. Review is also warranted because the court of appeals' community standards holding conflicts with this Court's decisions. In *Miller* v. *California*, 413 U.S. 15, 24, 30 (1973), the Court upheld the constitutionality of applying community standards to determine whether material appeals to the prurient interest and is patently offensive. In both *Hamling* v. *United States*, 418 U.S. 87 (1974), and *Sable Communications of California, Inc.* v. *FCC*, 492 U.S. 115 (1989), the Court held that there is no constitutional barrier to requiring commercial entities whose commercial activities have effects in multiple geographic areas to bear the responsibility for complying with the standards in each geographic area. Under those cases, COPA's incorporation of community standards does not violate the First Amendment.

Respondents contend (Br. in Opp. 24-25) that *Hamling* and *Sable* apply only to situations in which commercial entities can distribute material to one geographic area without simultaneously distributing it to

others. Those decisions, however, do not depend on that precondition. Under those decisions, it is both fair and reasonable to require commercial entities that take advantage of a nationwide market for their communications to ensure that those communications are not harmful to children throughout the nation. If a commercial entity's "audience is comprised of different communities with different local standards," the commercial entity "ultimately bears the burden of complying with the prohibition on [harmful-to-minor] messages." *Sable*, 492 U.S. at 126.

Respondents assert (Br. in Opp. 22-23) that, because of the technological limitations of the World Wide Web, COPA impermissibly requires a commercial entity to comply with the standards of the most conservative community. Congress found, however, that, as applied to a national medium like the World Wide Web, the harmful to minors standard is "one that is reasonably constant among adults in America." H.R. Rep. No. 775, 105th Cong., 2d Sess. 28 (1998). Respondents cite no evidence that contradicts Congress's finding.

Respondents' argument also fails to take into account features of COPA that reinforce a "reasonably constant" harmful-to-minors standard. COPA applies only to material that:

> (A) the average person, applying contemporary community standards, would find, taking the material as a whole and with respect to minors, is designed to appeal to, or is designed to pander to, the prurient interest;
>
> (B) depicts, describes, or represents, in a manner patently offensive with respect to minors, an actual or simulated sexual act or sexual contact, an actual or simulated normal or perverted sexual act, or a

lewd exhibition of the genitals or post-pubescent female breast; and

(C) taken as a whole, lacks serious literary, artistic, political, or scientific value for minors.

47 U.S.C. 231(e)(6) (Supp. IV 1998).

Significantly, the "serious value" prong of the harmful-to-minors standard does not incorporate community standards. It therefore readily "allows appellate courts to impose some limitations and regularity * * * by setting, as a matter of law, a national floor for socially redeeming value." *Reno* v. *ACLU*, 521 U.S. 844, 873 (1997). The "appeals to the prurient interest" and "patently offensive" prongs do incorporate community standards. See *Miller*, 413 U.S. at 24, 30. Even as to those prongs, however, there remain important substantive limitations, enforceable by a reviewing court on independent review, on what falls within them. See *Brockett* v. *Spokane Arcades, Inc.*, 472 U.S. 491, 498-499 (1985) (holding that material appeals to the "prurient interest" when it appeals to a "shameful or morbid interest" in sex, not when it appeals to a "normal" interest in sex); *Erznoznik* v. *City of Jacksonville*, 422 U.S. 205, 213 & n.10 (1975) (material that contains nudity may be found to be harmful to minors only if it is, "in some significant way, erotic"); cf. *Jenkins* v. *Georgia*, 418 U.S. 153, 159-161 (1974) (establishing substantive limits on what may be deemed "patently offensive" with respect to adults and stating that "it would be a serious misreading of *Miller* to conclude that juries have unbridled discretion in determining what is 'patently offensive'"); *Bose Corp.* v. *Consumers Union*, 466 U.S. 485, 506-507 (1984) (independent appellate review applies to determinations concerning appeal to the prurient interest and patent offensiveness). As

the House Report explains, COPA applies only to material that is "clearly pornographic"; it does not apply to "entertainment, library, or news materials that merely contain nudity or sexual information." H.R. Rep. No. 775, *supra*, at 28. Respondents simply ignore the features of COPA that narrow its coverage and serve to promote a reasonably constant harmful-to-minors standard.

Thus, this Court's decisions, Congress's findings, and the structure of COPA uniformly lead to the conclusion that the court of appeals erred in its community standards holding. That holding warrants this Court's review.

3. Respondents devote the bulk of their opposition (Br. in Opp. 9-19) to attacks on COPA that the court of appeals did not embrace. This Court may appropriately grant certiorari to decide the community standards question that the court of appeals did resolve and that we present in the certiorari petition, while leaving respondents' additional arguments to be considered by the court of appeals in the first instance. In any event, those arguments do not demonstrate that COPA is unconstitutional, much less that this Court should not grant the petition for review in this case.

a. Respondents first argue (Br. in Opp. 9-13) that there is no difference between COPA and the Communications Decency Act of 1996 invalidated in *Reno* v. *ACLU*. But as we explain in our petition (at 6-8, 17-18), COPA differs from the CDA in a number of important ways that support Congress's judgment that COPA is the least restrictive way to further the government's compelling interest in protecting children from the effects of harmful materials.

First, the CDA applied not only to communications on the World Wide Web, but to all forms of com-

munication on the Internet, including communications through e-mail, listservs, newsgroups, and chat rooms. *Reno* v. *ACLU*, 521 U.S. at 851. In contrast, COPA applies only to material posted on the World Wide Web. 47 U.S.C. 231(a)(1) (Supp. IV 1998); H.R. Rep. No. 775, *supra*, at 12, 25. Second, the CDA applied to any material that was "indecent" or "patently offensive," without defining those terms, *Reno* v. *ACLU*, 521 U.S. at 871 & n.37, 873, 877, while COPA applies only to material that satisfies the specific three-prong standard discussed above. Third, the CDA defined a minor as any person under the age of 18. *Reno* v. *ACLU*, 521 U.S. at 865-866. In contrast, COPA, like the state law upheld in *Ginsberg* v. *New York*, 390 U.S. 629 (1968), defines minor to mean "any person under 17 years of age." 47 U.S.C. 231(e)(7) (Supp. IV 1998). Fourth, the CDA applied not only to commercial entities or transactions, but to all nonprofit entities and to individuals posting messages on their own computers. *Reno* v. *ACLU*, 521 U.S. at 856, 865, 877. In contrast, COPA applies only to those Web communications that are made "for commercial purposes." 47 U.S.C. 231(a)(1) (Supp. IV 1998). Fifth, the CDA made it unlawful for parents to permit their children to use the family computer to view indecent or patently offensive material, regardless of whether the parents believed that it was appropriate for their children to obtain that material because of its value. *Reno* v. *ACLU*, 521 U.S. at 865, 878. In contrast, COPA contains no such prohibition. H.R. Rep. No. 775, *supra*, at 15.

Respondents argue (Br. in Opp. 12-13) that none of those differences has "constitutional significance." That argument ignores this Court's decision in *Reno* v. *ACLU*. In explaining why the CDA could not be justified under *Ginsberg* and failed strict scrutiny, the

Court discussed each of the factors noted above. 521 U.S. at 865-866, 870-874, 877-879. Congress in turn took account of the Court's decision in *Reno* v. *ACLU* by tailoring COPA in a manner that responds to those very concerns that the Court identified. There accordingly is no merit to respondents' assertion (Br. in Opp. 9-12) that *Reno* v. *ACLU* requires invalidation of COPA.

The changes made by Congress, moreover, are obviously significant. Unlike some other means of communication on the Internet, it is both technologically and economically feasible to screen for age on the World Wide Web. Pet. App. 75a-77a. COPA's three-prong harmful-to-minors standard tracks the standard upheld in *Ginsberg*; it does not suffer from the vagueness of the CDA's standard; and it vastly narrows the scope of coverage, eliminating coverage of such things as the seven "dirty words" monologue at issue in *FCC* v. *Pacifica Foundation*, 438 U.S. 726 (1978), discussions about safe sex practices, and library card catalogues. See *Reno* v. *ACLU*, 521 U.S. at 878. COPA's reduction in the age limit to under 17 allows more mature minors to have access to the material at issue. Persons who post material "for commercial purposes" can reasonably be expected to bear the cost of compliance as a part of the cost of doing business. And eliminating the prohibition against parents permitting their children to view the material at issue avoids interference with the parent-child relationship. Respondents' assertion (Br. in Opp. 12-13) that the changes have "no constitutional significance" is simply incorrect.

b. Respondents also argue (Br. in Opp. 14-17) that COPA imposes an unacceptable burden on constitutionally protected speech because adults will be deterred from seeking access to material that is placed behind

adult verification screens. The district court found, however, that adult verification services provide personal identification numbers to adults for $16.95 per year and furnish Web site operators with the software necessary to screen for such numbers at no cost. Pet. App. 75a-77a. The district court also found that approximately three million users possess a valid ID from one such service and that more than 46,000 sites use that service. *Id.* at 76a. While "some" adults may nonetheless be deterred from seeking access to material placed behind adult verification screens, *id.* at 81a, that is a small cost to pay for protecting children from the harmful effects of graphic pornographic images on the World Wide Web.

Under respondents' contrary view, state laws that require commercial vendors to place "harmful to minors" material behind a "blinder rack," in a "sealed wrapper," or inside an "opaque cover," and that require proof of adult status for purchase of such materials, would all be unconstitutional. All such laws deter "some" adults from purchasing the material. Despite that effect, the lower courts have regularly upheld those laws. See, *e.g.*, *Crawford* v. *Lungren*, 96 F.3d 380 (9th Cir. 1996), cert. denied, 520 U.S. 1117 (1997); *American Booksellers* v. *Webb*, 919 F.2d 1493, 1509 (11th Cir. 1990), cert. denied, 500 U.S. 942 (1991); *American Booksellers Ass'n* v. *Virginia*, 882 F.2d 125, 127-128 (4th Cir. 1989), cert. denied, 494 U.S. 1056 (1990); *Upper Midwest Booksellers Ass'n* v. *City of Minneapolis*, 780 F.2d 1389 (8th Cir. 1985); *M.S. News Co.* v. *Casado*, 721 F.2d 1281 (10th Cir. 1983). There is no reason for a different outcome here.

c. Finally, respondents contend (Br. in Opp. 17-19) that COPA is not narrowly tailored because the use of filtering software by parents is less restrictive and at least as effective. COPA, however, *compels* Web publishers to take steps to prevent minors from obtaining access to material that is harmful to them. Under respondents' "alternative," no entity is required to install filtering software. See Pet. App. 94a n.6; compare *United States* v. *Playboy Entertainment Group, Inc.*, 529 U.S. 803, 816 (2000). Blocking software also has several additional built-in limitations. As the district court found, it both blocks certain material that is not harmful to minors and fails to screen out certain material that is harmful to minors. Pet. App. 94a. It can be defeated by a computer-savvy minor. *Id.* at 82a. It can be expensive to purchase. H. R. Rep. No. 775, *supra*, at 19. And it must be updated periodically at an additional cost. *Id.* at 20.

More fundamentally, the requirements of COPA and the use of blocking software by parents are not mutually exclusive alternatives. Both can work together to prevent children from being exposed to harmful-to-minors material, and Congress envisioned that they would. 47 U.S.C. 230(d) (Supp. IV 1998) (requiring Internet service providers to notify customers of the availability of blocking software); H.R. Rep. No. 775, *supra*, at 19 (noting that blocking software may be effective for many parents). In those circumstances, any debate about which is more effective operating alone is beside the point. The relevant question is whether Congress's entire scheme—which envisions COPA and blocking software operating together—is significantly more effective in preventing access to harmful-to-minors material than the use of blocking software alone. Since the two together are significantly more effective in protecting children from harmful material than blocking software alone, respondents'

proposed alternative is not as effective as the scheme that Congress enacted.*

* * * * *

For the foregoing reasons and the reasons stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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* Respondents assert (Br. in Opp. 19-20 n.3) that the government did not "challenge on appeal[] the district court's factual finding that blocking software was more effective at achieving the government's interest." The district court, however, found only that blocking software "may be at least as successful as COPA would be in restricting minors' access to harmful material," Pet. App. 94a, not that it "was more effective." Moreover, relying on the limitations on blocking software discussed above, the government argued on appeal that blocking software is not a less restrictive and equally effective alternative. C.A. Br. 44-47. In any event, the relevant inquiry is not whether the district court's determination on the issue of effectiveness is supported by the record, but whether "substantial evidence" supports Congress's determination on that issue. *Turner Broad. Sys., Inc.* v. *FCC*, 520 U.S. 180, 195-196 (1997).